

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

77-1481
78-1001

To be argued by
HAROLD JAMES PICKERSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1481, 78-1001

UNITED STATES OF AMERICA,

—v.—

Appellee,

DANIEL SCOTT PALTER and ANDY CASTRO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**PETITION OF THE UNITED STATES OF AMERICA FOR
REHEARING AND SUGGESTION FOR REHEARING
IN BANC**

RICHARD BLUMENTHAL
*United States Attorney
District of Connecticut*

HAROLD JAMES PICKERSTEIN
Chief Assistant United States Attorney

JEREMIAH F. DONOVAN
Assistant United States Attorney

DENISE M. MCGRATH
Law Student Intern

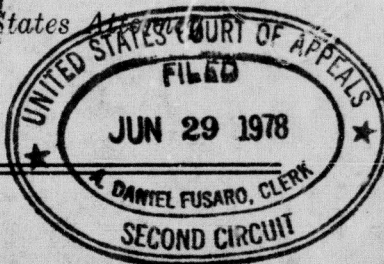




TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of the Case	1
Statement of the Case	2
Grounds for Rehearing <i>In Banc</i>	3
ARGUMENT:	
This Circuit should modify its rule that a judge's failure to comply with Rule 11(c) must result in a defendant's plea being treated as a nullity, even though the defendant was not prejudiced and would not have changed his guilty plea had the judge complied with Rule 11(c)	5
CONCLUSION	8

TABLE OF CASES

<i>Aviles v. United States</i> , 405 F. Supp. 1374 (S.D.N.Y. 1975), <i>aff'd without opinion</i> , 530 F.2d 307 (2d Cir. 1976)	5
<i>Chapman v. California</i> , 386 U.S. 18 (1967)	7
<i>Ferguson v. United States</i> , 513 F.2d 1011 (2d Cir. 1975)	4
<i>Hamling v. United States</i> , 418 U.S. 87 (1974)	7
<i>McCarthy v. United States</i> , 394 U.S. 459 (1966) ..	6
<i>Michel v. United States</i> , 507 F.2d 461 (2d Cir. 1974)	4
<i>United States v. Alejandro</i> , 569 F.2d 1200 (2d Cir. 1978)	3

	PAGE
<i>United States v. Chavez</i> , 416 U.S. 562 (1974)	7
<i>United States v. Friedman</i> , 436 F. Supp. 1033 (S.D. N.Y. 1977)	4
<i>United States v. Journet</i> , 544 F.2d 633 (2d Cir. 1977)	3
<i>United States v. Michaelson</i> , 552 F.2d 472 (2d Cir. 1977)	5
<i>United States v. Saft</i> , 558 F.2d 1073 (2d Cir. 1977)	5
<i>United States v. Scharf</i> , 551 F.2d 1124 (8th Cir.), cert. denied, 98 S.Ct. 70 (1977)	7

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 77-1481, 78-1001

UNITED STATES OF AMERICA,

Appellee,

—v.—

DANIEL SCOTT PALTER and ANDY CASTRO,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**PETITION OF THE UNITED STATES OF AMERICA FOR
REHEARING AND SUGGESTION FOR REHEARING
IN BANC**

Preliminary Statement

The United States of America respectfully petitions for rehearing, and suggests rehearing *in banc*, of a judgment of the United States Court of Appeals for the Second Circuit entered on May 18, 1978, vacating and remanding judgment of conviction of violations of 21 United States Code, Section 846 which had been entered pursuant to guilty pleas by appellants in the United States District Court for the District of Connecticut. *United States v. Daniel Scott Palter and Andy Castro*, Docket Nos. 77-1481, 78-1001, slip op. 3093.

Statement of the Case

On September 27, 1977, appellants pleaded guilty to conspiracy to manufacture amphetamine in violation of 21 United States Code, Section 846, in the United States District Court for the District of Connecticut. Appellants had been charged with the unlawful manufacture of amphetamine in violation of 21 United States Code, Section 841(a)(1), but pursuant to a plea bargain the Government moved to dismiss the substantive counts of the indictment upon appellants' pleading guilty to the conspiracy charge.

During the guilty plea proceeding, the District Court (Honorable Robert C. Zampano) advised appellants that, upon conviction, they would be sentenced to a mandatory special parole term of at least two years in addition to a period of imprisonment. The court did not, however, inform the appellants that the mandatory special parole term could last as long as they lived. This Court has accurately summarized the appellants' tender of guilty pleas to Judge Zampano:

Both [of the appellants] were represented by able and experienced attorneys who are specialists in the field of criminal law. Both admitted under questioning that they understood what mandatory special parole was and had been advised by their attorneys on this issue. The plea bargain was carried out by the Government which dismissed the substantive counts of the indictment. It seems clear that neither was prejudiced and that neither would have changed his guilty plea had the sentencing judge set forth the maximum parole sentence which was within his discretion.

Slip op. at 3094-95. In addition, appellant Palter was himself an attorney. Neither defendant was sentenced to a special parole term longer than the two-year mini-

mum: Castro was sentenced to the custody of the Attorney General for an eighteen-month period followed by a two-year special parole term; Palter was sentenced to the custody of the Attorney General for a period of four months to be followed by a two-year special parole term.

Appellants argued on appeal that the District Court erred upon accepting their guilty pleas, since the court had not advised them that the mandatory special parole term to be imposed under 21 United States Code, Section 846 could last for appellants' lifetimes. Despite the true harmlessness of the omission, the Court of Appeals panel (Smith and Mulligan, J.J.¹) felt that it was "nonetheless bound to apply the law of the circuit," slip op. at 3095. The law of the circuit, set forth in *United States v. Journet*, 544 F.2d 633 (2d Cir. 1977), and *United States v. Alejandro*, 569 F.2d 1200 (2d Cir. 1978), is that despite the absence of prejudice to a defendant, or the fact that a defendant would not have changed his guilty plea had the sentencing judge fully complied with the requirements of Federal Rules of Criminal Procedure, Rule 11(c), a plea must be treated as a nullity if the sentencing judge fails personally to inform the defendant of each and every right set out in the Rule.

Grounds for Rehearing *In Banc*

The Government petitions for rehearing, and suggests rehearing *in banc*, for the following three reasons.

First, the two-judge panel deciding this case was constrained by being required to follow the precedents of the circuit even though the panel may not have agreed with those precedents and even though following those

¹ The Honorable Robert P. Anderson, who had heard the argument in this case, died on May 2, 1978, before the case could be decided.

precedents may have led to a distressing result. Judges Smith and Mulligan stated that they were "bound to apply the law of the circuit." Slip op. at 3095. Though tightly bound by the precedents of *Journet* and *Alejandro*, the two judges were careful to note that they found merit in Judge Hays's dissent in *Alejandro*. Slip op. at 3095. Needless to say, only the Court sitting *in banc* can overrule a panel decision. The Court sitting *in banc* should be provided the opportunity, in the context of the present case, of passing upon the validity of Judge Hays's *Alejandro* dissent and its contention that an appellant must demonstrate that he has been prejudiced in some way by a district court's failure fully to comply with the requirements of Rule 11(c) before the extreme remedy of vacatur and remand for repleading is granted.

Second, the application of the rule of *Journet* and *Alejandro* to the present case leads to a distressing result. Appellants were advised by the district court that they would be subject to a term of imprisonment of up to five years and a minimum mandatory special parole term of two years. Castro was sentenced to eighteen-months' confinement followed by a two-year special parole term; Palter was sentenced to four-months' confinement followed by a two-year special parole term. As the panel opinion notes, "[i]t seems clear that neither was prejudiced and that neither would have changed his guilty plea had the sentencing judge set forth the maximum parole sentence which was within his discretion." Yet both appellants have been granted the opportunity to plead again, to take a second turn in what must seem to them a sentencing game-of-chance. This unfortunate result indicates that the Court *in banc* should be provided the opportunity to reconsider and modify the rule of *Journet* and *Alejandro*.

Third, the problem frequently recurs. See e.g., *Ferguson v. United States*, 513 F.2d 1011 (2d Cir. 1975); *Michel v. United States*, 507 F.2d 461 (2d Cir. 1974); *United States v. Friedman*, 436 F. Supp. 1033 (S.D.N.Y.

1977); *Aviles v. United States*, 405 F. Supp. 1374 (S.D. N.Y. 1975), *aff'd without opinion*, 530 F.2d 307 (2d Cir. 1976). By modifying the rule of *Journet* and *Alejandro* to require that appellants demonstrate some prejudice resulting from a Rule 11(c) violation, this Court could staunch what seems to be a growing feeling among certain defendants that a guilty plea is merely an intermediate stage in criminal procedure, to be appealed and voided if the result is an unfavorable sentence.

ARGUMENT

This Circuit should modify its rule that a judge's failure to comply with Rule 11(c) must result in a defendant's plea being treated as a nullity, even though the defendant was not prejudiced and would not have changed his guilty plea had the judge complied with Rule 11(c).

The law of this circuit is that an appellant need not demonstrate that he was harmed by a judge's failure fully to comply with the requirements of Rule 11(c); nor need an appellant allege that he would have changed his plea had the requirements of Rule 11(c) been fully observed. With certain exceptions,² every failure to

² Violations of Rule 11(c) (5) (requiring that the defendant be advised that if he should decide to plead guilty the court would have the right to ask him questions under oath about the offense in which event, if he should give untrue answers, his statements under oath could be used against him in a prosecution for perjury) will not necessarily result in a plea's being vacated. *Journet*, *supra*, 544 F.2d at 637 n.6. On occasion, this Court has strained to find in the record indications that Rule 11(c) has been complied with, thus averting some of the harsher applications of the *Journet/Alejandro* rule. See *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977); *United States v. Michaelson*, 552 F.2d 472 (2d Cir. 1977).

comply with Rule 11(c), no matter how technical, inconsequential or demonstrably harmless, must result in a plea's being treated as a nullity. See *Journet, supra*, 544 F.2d at 636; *Alejandro, supra*, 569 F.2d at 1201; slip op. at 3095.

The source of the *Journet/Alejandro* rule is *McCarthy v. United States*, 394 U.S. 459 (1966), in which the Supreme Court stated unqualifiedly that "a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew." 394 U.S. at 472. *McCarthy*, however, involved a seriously defective guilty plea proceeding (conducted just two weeks after the effective date of the 1966 amendments to Rule 11) in which the district court, in gross disregard of the Rule, had not even ascertained whether the defendant understood the nature of the charges against him. The "automatic reversal" rule was designed in large part to ensure strict compliance with the 1966 version of Rule 11, which worked major beneficial changes in the plea-taking process in the federal courts by requiring personal interrogation of the defendant, on the record, about the voluntariness of and factual basis for his guilty plea.

There are at least two reasons why this prophylactic rule may have outlived its usefulness. To begin with, we have come a long way in the last decade in the procedures employed in taking a plea of guilty in federal court. Whatever benefits once accrued from reversing every conviction obtained after a Rule 11 violation, even a trivial one, as a means of encouraging trial judges to comply strictly with a set of unfamiliar but salutary rules are now outweighed by the societal costs imposed by blind application of an automatic reversal remedy to what are at most isolated and inadvertent transgressions. Every trial judge is now aware of Rule 11's demands; most, in fact, were not even on the bench before 1966.

Reversals because of an inconsequential defect no longer serve a substantial didactic function. They tend only to breed disrespect for the criminal law by making it appear a game.

What is more, the 1975 amendments to Rule 11 have added substantial requirements to a rule that previously had been limited to a few considerations essential to the establishment of a knowing and intelligent plea. As this Court has held, *see* note 2 *supra*, it makes little sense to require that a judge conform to the letter of Rule 11(c)(5) in a circuit in which the district courts do not uniformly place a defendant under oath during a judge's inquiry into the factual basis for the defendant's plea; despite the mandatory "must" of Rule 11(c), district judges in this circuit need not necessarily comply with Rule 11(c)(5). So, too, various other failures to comply with one of the numerous requirements of Rule 11(c) may, in the context of a particular case, result in no harm to a defendant, and should not serve as a basis for setting aside a conviction.

The Eighth Circuit has recently taken an enlightened view of the matter, holding that "not every failure of the district court to comply with * * * Rule [11] entails the setting aside of a conviction with leave to withdraw a plea of guilty." *United States v. Scharf*, 551 F.2d 1124, 1130 (8th Cir.), *cert. denied*, 98 S.Ct. 70 (1977). This holding is eminently sensible: violations of the Constitution (*see Chapman v. California*, 386 U.S. 18 (1967)), federal statutes (*see* 28 U.S.C. 2111; *United States v. Chavez*, 416 U.S. 562 (1974)), and other rules of criminal procedure (*see* F. R. Crim. P. 52(a); *Hamling v. United States*, 418 U.S. 87, 131-135 (1974)) may be found to have been harmless, and there is little reason not to apply the same principle to violations of Rule 11.

In the present case, the appellants apparently were well aware of the special parole provisions and neither would have changed his guilty plea if Judge Zampano had made explicit (by stating that the mandatory special parole term could last as long as life) what was clearly implicit in his statement that the parole term must last for a minimum of two years. This violation of Rule 11(c)—technical, inconsequential and demonstrably harmless—should not result in appellants' pleas being treated as nullities.

CONCLUSION

For all the foregoing reasons, the United States of America urges the Court to grant a rehearing of this case, preferably a rehearing *in banc*, and to affirm the judgments of conviction of the district court.

Respectfully submitted,

RICHARD BLUMENTHAL
United States Attorney
District of Connecticut

HAROLD JAMES PICKERSTEIN
Chief Assistant United States Attorney

JEREMIAH F. DONOVAN
Assistant United States Attorney

DENISE M. MCGRATH
Law Student Intern

★ U. S. Government Printing Office 1978— 714-063-ACT-315

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

No. 77-1481
78-1001

U S A,
Appellee

v.

Daniel Scott Palter, and Andy Castro,
Appellants

AFFIDAVIT OF SERVICE BY MAIL

Albert Sensale, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 914 Brooklyn Avenue,
Brooklyn, New York

That on the 29th day of June, 1978, deponent served the within Petition of U.S. for Rehearing and Suggestion for Rehearing in Banc upon Sheila Ginsberg, Atty. at Law, Phillips, Nizer, Benhamin, Krim & Ballon,
40 West 50th Street, New York, N.Y. 10019; and, Andrew B. Bowman, Esq., Federal
Public Defender, 770 Chapel Street, New Haven , CT 06510

Attorney(s) for the Appellants in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Sworn to before me,

Albert Sensale

This 29th day of June, 1978

PATRICIA D. O'HARA, Notary Public
State of New York, No. 31-465498
Qualified in New York County
Cert. Filed in Kings County
Commission Expires March 30, 1979

Patricia D. O'Hara

